84-308

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILLIAM M. PAAR, Petitioner

v.

JOHN P. FINNERTY, SHERIFF and ROBERT ABRAMS, NEW YORK STATE ATTORNEY GENERAL, Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

32pp

QUESTION PRESENTED FOR REVIEW

Whether the Second Circuit's denial of a Certificate of Probable Cause meets the sufficiency requirement of Civil Rule 52(b) if the Respondents have failed to answer an Order to Show Cause as required by Rule 5 of Rules Governing Section 2254 Cases in the United States District Courts.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

William M. Paar, Petitioner

v.

John P. Finnerty, Sheriff, Suffolk County, Robert Abrams, New York State Attorney General and Martin Bradley, Suffolk County Attorney,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, William M. Paar, respectfully urges that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered on

March 1, 1984.

OPINION BELOW

The decision of the United States Court of Appeals for the Second Circuit is attached as part of the appendix (App. 1A) affirming the refusal of the United States District Court for the Eastern District of New York to issue a certificate of probable cause (App. 2) so William M. Paar could appeal that Court's decision denying his petition for a writ of habeas corpus. (App. 3)

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), to review the judgment of the United States Court of Appeals for the Second

Circuit. This judgment was dated and entered on March 1, 1984 (App. 1A). Justice Thurgood Marshall on May 29, 1984 extended petitioner's time for filing a petition for writ of certiorari to and including June 29, 1984. (App. 1).

STATUTORY PROVISIONS INVOLVED

This case involves Rule 52(b) of the Federal Rules of Civil Procedure and Rules 4 and 5, Rules Governing Section 2254 in the United States District Courts.

Civil Rule 52(b)

When findings of fact are made ... by the court without a jury, ... the sufficiency of the evidence ... may thereafter be raised ...

Rule 4 - Rules governing Section 2254 cases in the United States District Courts.

... if it plainly appears ... that the petitioner is not entitled to relief ... the Judge shall make an order for its summary dismissal ... otherwise the Judge shall order the respondent to file an answer or other pleading.

Rule 5 - Rules governing Section 2254 cases in the United States District Courts.

The answer shall respond to the allegations of the petitioner ... shall state whether the petitioner has exhausted his state remedies ...

The court on its own motion ... may order that ... transcripts be furnished ...

STATEMENT OF CASE

The petitioner, William M. Paar, is pro se and has been since the time he filed for writ of habeas corpus under Title 28 U.S.C. § 2254.

The petitioner was incarcerated under F 102-80 as a result of a finding by the Family Court, County of Suffolk, State of New York, that he was in contempt for refusing to make child support payments to the Suffolk County Department of Social Services. On November 4, 1982 the Honorable Jacob Mishler, District Court Judge, Eastern

District of New York issued an order to show cause ordering the Attorney General to respond to petitioner's application for a writ of habeas corpus and submit any available transcript and record to the Court at the time of filing such return. In an order dated November 29, 1982 the Honorable David F. Jordan, Magistrate, amended the show cause order dated November 4, 1982 by adding the name of the Suffolk County Attorney to that of the Attorney General. Neither the Attorney General of the State of New York nor the Suffolk County Attorney answered the show cause order dated November 4, 1982

in conformance with Rule 5 of the Rules Governing Section 2254 cases in the United States District Courts. The District Court never enforced its jurisdiction under Rule 4 of the Rules Governing Section 2254 cases in the United States District Courts.

The Court of Appeals did not have benefit of the answer to the order to show cause as provided by Rule 5 of the Rules Governing Section 2254 cases in the District Courts when it denied petitioner's certificate of probable cause without comment.

REASON FOR GRANTING THE WRIT

The Second Circuit's Affirmation of the District Judge's denial of a certificate of probable cause lacks sufficiency of evidence to support such findings and is therefore subject to review under Rule 52(b) of the Federal Rules of Civil Procedure.

Rule 4 of the Rules Governing Section 2254 cases in the United States District Courts gives the District Court Judge great latitude in determining that evidence necessary to proper disposition of the case, and states in part below:

> "If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the District Court, that the Judge shall make an order

> for its summary dismissal and cause the petitioner to be notified. Otherwise the Judge shall order the respondent to file an answer or other pleading within the period of time fixed by the Court or to take such other action as the Judge deems appropriate."

Further, the advisory committee note to Section 2254, Rule 4 states in part:

> "It has been suggested that an answer should be required in every habeas proceeding, taking into account the usual petitioner's lack of legal expertise and the important functions served by the return. See Developments in The Law - Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1178 (1970)."

The District Court having determined that an answer is necessary to the proper disposition of the case, Rule 5 is specific in its requirements of the respondent and states in part:

> "The answer shall respond to the allegations of the petition. In addition, it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed."

Further, the advisory committee note Section 2254, Rule 5 states in part:

> "The answer plays an obviously important role in a habeas proceeding:
>
> > The return serves several important functions; it permits the Court and the parties to uncover quickly the disputed issues; it may reveal to the petitioner's attorney grounds for release that the petitioner did not know; and it may demonstrate that the petitioner's claim is wholly without merit.
>
> Developments in the Law-Federal Habeas Corpus, 83 Harv. L. Rev. 1083, 1178 (1970)."

The District Court having determined that under Rule 4 that

an answer is necessary , the importance of the evidence required by Rule 5, and its relevance to the proper adjudication of the petition for habeas corpus surely cannot be denied.

Petitioner represents that the District Court's refusal of a certificate of probable cause and the Court of Appeals' affirmation in the absence of the answer as required by Rule 5 of the Rules Governing Section 2254 cases does not meet the sufficiency requirement of Rule 52(b) of the Federal Rules of Civil Procedure and constitutes a very obvious and exceptional showing of error pursuant to the

two Court Rule, Graver Tank and Mfg. Co. v. Linde Air Prods. Co. (1949) 336 US 271, 275, 69 S. Ct. 535, 93 L. ed 672.

Respectfully submitted,

William M. Paar
Pro Se
c/o S. Mackin
311 East 54th Street
New York, New York 10022
(212) 751-6182

APPENDIX

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APPENDIX

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SUPREME COURT OF THE UNITED STATES

No. A-965

WILLIAM M. PAAR,

Petitioner,

v.

JOHN P. FINNERTY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 29, 1984.

/s/Thurgood Marshall
Associate Justice of the Supreme Court of the United States

Dated this 29th

day of May, 1984.

PRO SE

UNITED STATES COURT OF APPEALS

83-2346
2/28

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 1st day of March, one thousand nine hundred and eighty-four.

William M. Paar,

Appellant,

v.

John P. Finnerty and ano.,

83-2346

Appellees.

A motion having been made herein by appellant pro se for a certificate of probable cause, for leave to proceed in forma pauperis, for the assignment of counsel

Upon consideration thereof, it is Ordered that said motion be and it hereby is denied.

Irving R. Kaufman _____

James L. Oakes _____

Ralf K. Winter _____

IRK JLO RKW 3/1/84 Circuit Judges

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

App. 2

----------x

WILLIAM M. PAAR,

Plaintiff,

-against-

JOHN P. FINNERTY, Sheriff, ROBERT ABRAMS, N.Y.S. Attorney General,

Defendants.

CV 82-3238

Memorandum of Decision and Order

November 8, 1983

----------x

MISHLER, District Judge

Plaintiff's application for a certificate of probable cause pursuant to 28 U.S.C. § 2253 is denied. The claim is frivolous.

The Clerk of the Court is directed to forward the file to the Clerk of the Court of Appeals for review by a circuit judge.

SO ORDERED.

U.S.D.J.

Jacob Mishler

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

WILLIAM M. PAAR,

Plaintiff,

-against-

JOHN P. FINNERTY, Sheriff, and ROBERT ABRAMS, New York State Attorney General,

Defendants.

----------x

CV 82-3238

Memorandum of Decision and Order

September 12, 1983

A P P E A R A N C E S :

WILLIAM M. PAAR,
Plaintiff, Pro Se
c/o S. Mackin
311 East 54th Street
New York, New York 10022

HONORABLE DAVID J. GILMARTIN
SUFFOLK COUNTY ATTORNEY
Veterans Memorial Highway
Hauppauge, New York 11788
Chris Termini, Assistant
County Attorney

MISHLER, District Judge

This is a motion by plaintiff, pro se, to vacate[1]/ a judgment entered April 29, 1983 pursuant to the court's memorandum of decision and order of the same date. The memorandum of decision

and order of the court dismissed Mr. Paar's petition for a writ of habeas corpus because, since Mr. Paar had been released from custody and was under no other restraint, the petition was moot.

Petitioner's motion asserts no ground for vacating the aforesaid judgment. The motion to vacate the judgment is denied,2/ and it is

SO ORDERED.

_____

U.S.D.J.

Jacob Mishler

FOOTNOTES

1/ Petitioner moves for renewal or reconsideration of the judgment. Because the judgment is final, a motion for renewal or reconsideration is not available. We consider petitioner's motion as one to vacate the judgment.

2/ Magistrate Jordan's order for a status conference on December 19, 1983 is hereby vacated pursuant to the dismissal of petitioner's motion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA ex rel. WILLIAM M. PAAR

Petitioner,

-against-

JOHN P. FINNERTY-SHERIFF, ROBERT ABRAMS, NYS ATTY. GENERAL

Respondent.

----------x

No. 82 CV 3238

ORDER TO SHOW CAUSE

Upon the petition for issuance of a writ of habeas corpus, dated Oct. 23, 1982 a copy of which is attached, it is ORDERED that:

(1) The Attorney General of the State of New York, as attorney for the Respondent, show cause before this Court by the filing of a return to the petition, why a writ of

habeas corpus should not be issued;

(2) Within ten (10) days of receipt of this order, the Attorney General of the State of New York shall serve a copy of his return on the petitioner herein and file the original thereof, with proof of such service, with the Clerk of this Court;

(3) If the transcript of the trial be available, the Attorney General of the State of New York is directed to submit such transcript and record to this Court at the time of the filing of such return;

(4) Petitioner, within ten (10) days of the receipt by him of a copy of the return of the Attorney General, shall file his reply, if any, with the Clerk of this Court, in duplicate;

(5) Service of a copy of this order shall be made by the Clerk of this Court by mailing a copy thereof, together with a copy of the petition, to the Attorney General of the State of New York, 80 Centre Street, New York, N.Y. 10013 and by mailing a copy of this order to the petitioner.

Date: Uniondale, New York
November 4, 1982

_____
U.S.D.J.
Jacob Mishler